ATTORNEY FOR APPELLANT:

RANDY M. FISHER
Deputy Public Defender
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MARIO BORROEL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A04-0711-CR-614
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0611-FB-226

September 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Mario Borroel appeals his sentence following his conviction for Sexual Misconduct with a Minor, as a Class B felony. Borroel presents a single issue for review, namely, whether his sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 4, 2006, fifteen-year-old J.L. was partying with friends and his older brother, Justin, in a motel room in Fort Wayne. That same night, Borroel was at a Fort Wayne bar before J.L.'s classmates invited him to the motel room party. Borroel, who was twenty-nine years old at the time, was a friends with several of J.L.'s classmates and had met J.L. once prior to that night.

At the party, J.L. became intoxicated after drinking a large quantity of tequila and vodka. As a result, J.L. vomited, soiling his shirt. He removed his shirt, and he passed out. When he passed out he was wearing only boxers and shorts. Justin had passed out earlier. At some point, the other party guests left, leaving only Justin, J.L., and Borroel in the motel room.

J.L. later awoke because of a "sharp pain" "inside of [him.]" Transcript at 101. He found that he was wearing only his boxers. After he "realized what was going on," that Borroel had his penis in J.L.'s rectum, J.L. grabbed a bottle from the nightstand and swung it at Borroel. J.L. began screaming that Borroel was trying to rape him, and the

shouting woke Justin. Justin and J.L. then chased Borroel out of the motel room and down the street.

The State charged Borroel with criminal deviate conduct, as a Class B felony, and sexual misconduct with a minor, as a Class B felony. After a two-day trial, a jury found Borroel guilty of sexual misconduct with a minor, as a Class B felony, but it was "undecided' on the criminal deviate conduct charge. The court sentenced Borroel as follows:

> The court finds that there are no mitigating circumstances, that there are aggravating circumstances in the form of [Borroel's] extensive criminal history, including specifically those noted by counsel for the State, child molesting, as well as the fact that there is a felony conviction as an adult, an offense involving a child or a minor, and even while standing alone any one of them would not be terribly significant, these operating while suspended, operating while intoxicated, just further indicate [Borroel's] general disrespect for society and the law. And find [sic] that those aggravating circumstances outweigh any mitigating circumstances. Order Defendant committed to the Indiana Department of Correction[] for a period of 18 years. Jail time credit of 108 days.[1]

App. at 345.[2] After sentencing, the State dismissed the criminal deviate conduct charge. Borroel now appeals.[3]

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[1] The court's written sentencing order does not list aggravators and mitigators. When the oral and written sentencing statements differ, the court on appeal has the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing. Dowell v. State, 873 N.E.2d 59, 60 (Ind. 2007). Because the parties do not contest the accuracy of the oral statement, we consider that statement when reviewing Borroel's sentence.

[2] Borroel has included a complete copy of the transcript in his appendix. This practice not only violates Indiana Appellate Rule 50(A)(g), which instructs appellants to include "brief portions of the Transcript . . . that are important to a consideration of the issues raised on appeal," but results in unreasonably high copying expenses and an unwieldy file. We urge Borroel's counsel to abide by this important rule in the future.

[3] Borroel filed a notice of appeal on August 21, 2007. On March 13, 2008, the court dismissed the appeal with prejudice for failure to pursue the appeal. Borroel then filed a motion to file belated

DISCUSSION AND DECISION

Borroel contends that his eighteen-year sentence is inappropriate in light of the nature of the offenses and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Roush, 875 N.E.2d at 812 (alteration in original).

Here, the court sentenced Borroel to eighteen years after he was convicted of sexual misconduct with a minor, as a Class B felony. Indiana Code Section 35-50-2-5 provides in relevant part that a person who commits a Class B felony "shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory

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appeal on the ground that his counsel had never been notified that the transcript at been completed. This court granted that motion.

sentence being ten (10) years." Borroel received less than the maximum sentence. At sentencing, the trial court found no mitigators and Borroel's "extensive criminal history" as an aggravator.

Borroel's sentence is not inappropriate in light of his character. At the time of the offense, Borroel was a twenty-nine-year-old man who was partying in a motel room with high school students. The only other adult there was J.L.'s brother Justin. Neither J.L. nor Justin were more than acquainted with Borroel, but Borroel was friends with the other minors at the party. Borroel has three juvenile adjudications for child molesting, two juvenile adjudications for theft, and an adjudication for possession of marijuana. All of his juvenile adjudications resulted in commitment at the Indiana Boys School. And between 1995 and 2006 he accumulated convictions for the misdemeanors of criminal mischief (1995), conversion (1995), operating while suspended (2000 and 2002), contributing to the delinquency of a minor (2000), and operating while intoxicated (2002), as well as a 1995 conviction for auto theft, as a Class D felony.

Borroel contends that his sentence is inappropriate because he had only one felony conviction at the time of the offense, which was unrelated in gravity, nature, and number in relation to the current offense. See Ruiz v. State, 818 N.E.2d 927, 979 (Ind. 2004) (finding a maximum sentence for child molestation, as a Class B felony, inappropriate where criminal history included only alcohol offenses). But Borroel's criminal history is like that in Kincaid v. State, 839 N.E.2d 1201, 1208 (Ind. Ct. App. 2005). There, the trial court imposed maximum concurrent sentences after Kincaid was convicted of aggravated battery and battery of his infant son. Kincaid's criminal history included adult

convictions for alcohol offenses, but he also had juvenile adjudications for theft and auto theft as well as for two felonies, intimidation and escape, if committed by an adult. Given that record and the extreme consequences of the battery on his young son, we held that Kincaid's sentence was not inappropriate. Id. at 1208.

Likewise, here, Borroel's felony conviction is neither recent nor related in nature to the offense of sexual misconduct with a minor. But that conviction is only part of his criminal history. Borroel's criminal history also includes misdemeanor convictions for criminal mischief, conversion, operating while suspended, contributing to the delinquency of a minor, and operating while intoxicated. Moreover, he also had three juvenile adjudications for child molesting, as well as two for theft and one for possession of marijuana. The trial court summed up Borroel's criminal history as evidence of his "disrespect for society and the law." App. at 345. We agree and conclude that Borroel's sentence is not inappropriate in light of his character.

We next consider whether Borroel's sentence is inappropriate in light of the offense. Again, Borroel was twenty-nine years when he accepted an invitation from high school students to party in a motel. There he found fifteen-year-old J.L. extremely intoxicated. While J.L. was passed out, Borroel had anal sex with J.L. J.L. awoke while the offense was occurring, objected vehemently, and swung at Borroel with a bottle from the nightstand before chasing him down the street. In sum, Borroel was having sex with a passed-out minor. And the offense was extremely traumatic for Borroel's victim, causing him significant emotional harm. His eighteen-year sentence in not inappropriate in light of the nature of the offense.

Finally, Borroel argues that his sentence is inappropriate because he is not the worst offender and his conviction is not for the worst offense. He argues:

> Sexual Misconduct with a Minor, as a Class B Felony conviction, although significant and serious, is certainly not the "worst" offense within Indiana's relevant statutory classifications for crimes. Additionally, considering the State's evidence at trial, Mr. Borroel is not the most culpable offender that the Indiana Court of Appeals has scrutinized under this statute.

Appellant's Brief at 13. But, as Borroel acknowledged earlier in his brief, in reviewing a sentence the court "'should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.'" Id. (quoting Williams v. State, 782 N.E.2d 1039, 1051 (Ind. Ct. App. 2003), trans. denied). Borroel acknowledges the limitations in applying the "worst offense and offender" analysis to a sentence, but nonetheless requests this court to ignore these limitations. We will not do so. Williams, 782 N.E.2d at 1051.

Affirmed.

ROBB, J., and MAY, J., concur.